

Public Prosecutor v Suraj Bahadur Sunar (w/Nepal)

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO
B-05-30-02 OF 2012
BALIA YUSOF, TENGKU MAIMUN AND ZAWAWI SALLEH JJCA
9 SEPTEMBER 2014

Criminal Procedure — Appeal — Appeal by prosecution — Accused person charged for offence of murder — Penal Code s 302 — Defence of insanity under s 84 of the Penal Code — Decision by trial judge that defence of insanity proven — Appeal by prosecution — Whether trial judge correct in arriving at decision

In the High Court, the respondent was charged for murder, an offence under s 302 of the Penal Code ('the Code'). The respondent was a caretaker of an orchard belonging to SP13 while the deceased was a helper on the neighbouring chicken farm. SP13 had received complaints from the deceased that the respondent had been harassing her and had borrowed money from the deceased but refused to pay back. This caused arguments between the respondent and the deceased. The deceased was found with her throat slit. A knife suspected to have been used for the murder was recovered from the kitchen of the house where the respondent was working and clipping of the respondent's nails revealed the deceased's DNA. Although there were no incriminating marks on the knife to suggest that it was the weapon used in slitting the throat of the deceased, the trial judge ruled that a reasonable inference could be drawn that the knife discovered from the respondent was indeed the knife used in the commission of the murder. The evidence which the trial judge found to have nailed the respondent was the presence of the deceased's DNA on his finger clippings. The respondent called two other witnesses. Their evidence showed that the respondent was suffering from mental illness. At the end of the defence's case, the trial judge found that the defence of insanity had been proven. Dissatisfied with the decision of the trial judge, the prosecution filed an appeal.

Held, allowing the appeal:

- (1) The behaviour of the respondent was the behaviour of a normal person. From the testimony of witnesses, there was nothing to show that the respondent was suffering from any mental illness that had impaired his cognitive faculties and that the respondent was incapable of knowing the nature of his act or of knowing that what he did was wrong or contrary to law. Furthermore, no evidence was elicited from SP13 that at any time during his employment or immediately prior to the commission of the

- A offence, the respondent had exhibited a behaviour showing the syndromes of a depressive disorder severe degree with psychotic features (see paras 21 & 23).
- B (2) There were merits in the appeal by the prosecution. The trial judge had misdirected himself and had erred in His Lordship's finding that the respondent had successfully raised the defence of insanity under s 84 of the Code. The order of the trial judge was set aside and substituted with that of a conviction under s 302 of the Code. The respondent was guilty of murder and hence, sentenced to death (see paras 24–25).

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[Bahasa Malaysia summary]

- Di Mahkamah Tinggi, responden dituduh membunuh, kesalahan di bawah s 302 Kanun Keseksaan ('Kanun'). Responden adalah penjaga dusun yang dimiliki oleh SP13 sementara si mati adalah pembantu di penternakan ayam yang berhampiran. SP13 telah menerima aduan daripada si mati bahawa responden telah menganggunya dan meminjam wang daripada si mati tetapi enggan untuk membayar balik. Ini menyebabkan pertengkaran antara responden dan si mati. Si mati didapati mati dengan lehernya dikelar. Pisau yang disyaki diguna untuk pembunuhan tersebut ditemui di dapur rumah di mana responden bekerja dan keratan kuku responden menunjukkan DNA si mati. Walaupun tiada tanda pada pisau yang ia adalah senjata yang digunakan untuk mengelar leher si mati, hakim perbicaraan memutuskan bahawa inferens munasabah boleh dibuat bahawa pisau yang ditemui daripada responden sememangnya pisau yang digunakan di dalam melakukan pembunuhan tersebut. Keterangan yang didapati oleh hakim perbicaraan untuk menangkap responden adalah kehadiran DNA si mati atas keratan kukunya. Responden memanggil dua saksi lain. Keterangan mereka menunjukkan bahawa responden mengidap penyakit mental. Pada akhir kes pembelaan, hakim perbicaraan mendapati bahawa pembelaan hilang akal telah dibuktikan. Tidak puas hati dengan keputusan hakim perbicaraan, pihak pendakwaan memfailkan rayuan.

Diputuskan, membenarkan rayuan:

- H (1) Tingkah laku responden adalah tingkah laku seorang yang normal. Daripada keterangan saksi-saksi, tiada yang dapat menunjukkan bahawa responden mengidap apa-apa penyakit mental yang menyebabkan kehilangan fakulti kognitifnya dan bahawa responden tidak dapat mengetahui sifat tindakannya atau mengetahui bahawa apa yang dibuatnya adalah salah atau bertentangan undang-undang. Selanjutnya, tiada keterangan dicungkil daripada SP13 bahawa pada bila-bila masa semasa dia bekerja atau sebelum sahaja melakukan kesalahan, responden telah menunjukkan tingkah laku sindrom gangguan kemurungan tahap teruk dengan ciri-ciri psikotik (lihat perenggan 21 & 23).
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- (2) Terdapat merit dalam rayuan oleh pihak pendakwaan. Hakim perbicaraan telah tersalah arah dan tersilap dalam dapatannya bahawa responden telah berjaya membangkitkan pembelaan hilang akal di bawah s 84 Kanun. Perintah hakim perbicaraan diketepikan dan digantikan dengan sabitan di bawah s 302 Kanun. Responden didapati bersalah membunuh dan maka, dijatuhkan hukuman mati (lihat perenggan 24–25).]

Cases referred to

- John a/k Nyumbei v PP* [2007] 7 MLJ 206; [2007] 2 CLJ 509, CA (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

Legislation referred to

- Criminal Procedure Code s 348(1)
Penal Code ss 84, 302

Appeal from: Criminal No 45–63 of 2009 (High Court, Shah Alam)

Viknesvaran Purnshatman (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.

KA Ramu (KA Ramu Vasanthi & Assoc) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

- [1] The respondent was charged in the High Court at Shah Alam for the murder of one Indra Rani a/p Munusamy (KPT 590220–10–5000), an offence punishable under s 302 of the Penal Code.
- [2] The prosecution's case is as follows. The respondent was a caretaker of an orchard owned by Wong Yee Woh ('SP13'). The respondent was employed to take care of SP13's weekend house located on the orchard as well as the orchard. On the day stated in the charge, the deceased who was a helper on the neighbouring chicken farm, was found by her co-worker 'SP5', with her throat slit.
- [3] SP13 had received complaints from the deceased that the respondent had been harassing her; that the respondent has often climbed over the wall separating the two farms and had often contacted the deceased who was staying in a shed on the neighbouring farm; that the respondent had also borrowed money from the deceased and had refused to pay back, which had given rise to arguments between the respondent and the deceased.
- [4] Upon arrest, the respondent had led the police to the kitchen of the house where he was working. As a result of the information given by the

- A respondent to the police, a knife was recovered which was suspected to be the weapon used to slit the throat of the deceased (exh P22a). The police had taken the nail clippings of the respondent and from one of the nail clippings, the chemist ('SP4') found the DNA of the deceased.
- B [5] The post mortem report (exh P32) states that the cause of death was incised wound to the neck. SP8 who conducted the post mortem confirmed that the deceased had died of injuries on the throat which was caused by a sharp object similar to exh P22a.
- C [6] The learned trial judge found the information given by the respondent to the police which led to the discovery of the knife to be voluntary. Although there were no incriminating marks on the knife to suggest that it was the weapon used in slitting the throat of the deceased, the learned trial judge ruled that a reasonable inference could be drawn that the knife discovered from the
- D respondent was indeed the knife used in the commission of the murder. The evidence which the learned trial judge found to have nailed the respondent was the presence of the deceased's DNA on his finger clippings. The learned trial judge found that the prosecution had proven a prima facie case against the
- E respondent. The respondent was therefore called upon to enter his defence.
- [7] The learned trial judge found that the prosecution had proven a prima facie case against the respondent. The respondent was therefore called upon to enter his defence.
- F [8] In his evidence given from the dock (at p 391: RR *Jld* 4), the respondent in his short statement said: '... early morning just I wake up and I went that day to cut the grass and I came back from cutting the grass and clean my room and I feed the dogs and chicken. Then after that I went to the market and after I
- G went to the market I eat something then around 1.00pm I came back from the market and I reach near to my door then police call me and I just looked at him and then I just jump on my wall and then I went to the police. Then police pointed pistol on me and took me with him. Then police beat me and they start asking me where is the knife, where have you put the knife and I replied him I
- H don't know, I don't know about the knife because I went to work in the morning. Police is still asking me and he was beating on me and I again and again replied I don't know. Then police took me to the hospital and in the hospital they took my blood after the police took me to my home and again he ask where is the knife. I replied I don't know. Then they took out the knife and
- I they ask me to point by my finger. Then I pointed by my finger the knife then they took me to the lockup and put me in the lockup. That's all Your Honour'.
- [9] The respondent called two other witnesses. In gist, their evidence was to show that the respondent was suffering from mental illness. At the end of the

case, the learned trial judge found that the defence of insanity had been proven. For convenience, we reproduce below the finding of the learned trial judge at the end of the case (pp 556–559: RR *Jld* 6):

The crucial evidence for the accused came from 2 witnesses who had travelled all the way from Nepal to testify for the accused. The first was the accused brother and the other was the doctor who had treated the accused in Nepal.

It was natural to view these 2 witnesses with suspicion as they had not featured in the police investigation and had appeared out of the blue although the defence counsel had notified the court at the start of the trial of a fax received from the Nepalese Embassy which pointed to a mental deficiency on the part of the accused.

The accused had in fact been examined by a local psychiatrist who did not find any mental illness on the part of the accused.

After listening to the evidence of these two witnesses however any doubts about their lack of credibility was erased. I found both the witnesses from their demeanour to be credible and honest witnesses whose testimony could be relied upon. The doctor to a question from the court also confirmed that he had no family ties with the accused.

The accused brother testified that the accused who was his younger brother had shown signs of abnormality from young and was always a loner. This had worried his family members to an extent where they found it necessary to refer him to a psychiatrist. The psychiatrist had confirmed the family's worst fears when the accused was diagnosed to be suffering from a mental illness requiring medication.

The exact nature of the accused mental illness was explained by the doctor who treated him. The doctor Dr Surendra Sherchan at the time of giving evidence was the acting Director of the only Mental Hospital of Nepal. His curriculum vitae showed the doctor to be having vast experience in the field of psychiatry. I found no reason to disregard his testimony with regards to the mental conditions of the accused. Although he had not brought with him the records of the Hospital pertaining to the accused history and treatment he nevertheless confirmed he had personally checked the records before coming to Malaysia. I had no reason to disbelieve him on this.

From the records it was shown that the accused was suffering from a Depressive disorder severe degree with psychotic features. He was given medication which resulted in gradual improvement of his condition and with almost full remission by the last week of July 2008. The accused was recommended for a follow up after 6 months but he never returned for further examination.

The doctor further testified that the ailment suffered by the accused was recurrent in nature and the accused could suffer a relapse. The illness could be triggered by any event or person resulting in the accused regarding the person to be his enemy. This could lead to negative consequences.

In this case there was evidence to show that the victim was pestering the accused to return the money he had borrowed. There was a possibility that this could have triggered the accused in having a relapse and causing him to slit the throat of the victim.

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- A The doctor also testified that there was no fixed time for a relapse and remission with this kind of illness and this could explain the fact that neither the accused employer nor the police or the doctor discovered any abnormalities on the part of the accused.
- B As a final determination of this case I decided that the accused was responsible for the death of the victim by slitting the throat but at the time of commission there was a great probability that he had suffered a relapse of the illness he was suffering causing him to be unaware of his actions.

In this situation I decided that section 84 of the Penal Code applied.

- C [10] The learned trial judge invoked s 348(1) of the Criminal Procedure Code which provides: 'Whenever the finding states that the accused person committed the act alleged, the Court before which the trial has been held shall, if the act would, but for the incapacity found, have constituted an offence, order that person to be kept in safe custody in such place and manner as the
- D Court thinks fit and shall report the case for the orders of the Ruler of the State in which the trial is held.', to direct that the respondent be detained at Hospital Permai Tampoi, pending the orders from His Royal Highness the Sultan of Selangor.
- E [11] Dissatisfied with the decision of the learned trial judge, the prosecution filed an appeal.

THE APPEAL

- F [12] Before us, the learned deputy public prosecutor submitted on only one issue, namely that the learned trial judge had erred in law and in fact in finding that the respondent had proven unsoundness of mind.
- G [13] The learned deputy directed our attention to the evidence of 'SP11', the psychiatrist, who had examined the respondent for two months when the respondent was placed under observation at the Hospital Bahagia, Ulu Kinta. Based on his examination, SP11 had concluded in his report (exh P39) that: '1. Encik Suraj Bahadur tidak mempunyai apa-apa gejala penyakit mental. 2. Semasa kejadian, beliau adalah waras'.
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- [14] It was the evidence of SP11 that (pp 228–229: RR *Jld* 2):

- I During the interview session he was calm, he was cooperative, he gave relevant information but at times he was guarded when we asked about certain things pertaining to the offence. Otherwise there was no psychotic features or mood disturbances ...
- ... He said he has never received any treatment in his native country or in Malaysia after coming to Malaysia. Any psychiatric treatment.

[15] In cross-examination, SP11 was consistent in his answer that the respondent had said that he had never been admitted to a hospital in Nepal. A

[16] Apart from the evidence of SP11, there was the evidence of SP13 who had said that he did not notice any abnormalities in the respondent when the respondent was working for him. B

[17] The evidence of SP6, the employer of the deceased, established the connection that the deceased had with the respondent. SP6 testified that (pp 90–91: RR *Jld* 1): C

Dia akan memanjat tembok. Sebab antara kebun saya dengan kebun Encik Robert ada tembok, tembok tinggi juga. Dia ada panjat. Sebab memandangkan rumah saya dengan rumah mangsa adalah lebih kurang 300 kaki ... kadang-kadang saya nampak dari jauh dia panjat ikut belakang ... Jadi terus pergi ke rumah mangsa. ... D

... dia mengadu orang kena tuduh ini telah ceroboh bilik dia pada waktu pagi lebih kurang dalam pukul 6.00 pagi dan dia kenal siapa yang masuk itulah, dia kenal bahawa yang masuk itu orang Nepal sebelah. So saya beritahu kepada mangsa suruh report kepada bos dia Encik Robert sebab Encik Robert hanya datang ke kebunnya setiap hujung minggu Sabtu atau Ahad. E

OUR DECISION

[18] Before we proceed to consider the issue, we bear in mind the principle that the court should be concerned, not with medical insanity, but with legal insanity and the material time is the time of the commission of the offence. F

[19] Coming back to the issue, we can do no better than to quote and to endorse the judgment of the Abdull Hamid Embong JCA (as he then was) in the case of *John a/k Nyumbei v Public Prosecutor* [2007] 7 MLJ 206; [2007] 2 CLJ 509 where His Lordship said: G

10. The law on unsoundness of mind as a complete defence in our criminal jurisprudence is, as was correctly submitted by learned counsel for the appellant, contained in s 84 of the Penal Code. It states: H

84 Nothing is an offence which is done by a person who, at the time of the doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary in law. I

11. This section exempts a person found to be insane of any criminal responsibility if it is found that he is 'incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law' (see commentary in *Rattanlal and Dirajlal's Law of Crimes*, (25th Ed), p 280).

- A** The learned authors there further commented that a person 'is not protected if he knew that what he was doing was wrong, even though he did not know that it was contrary to law, and also, if he knew what he was doing was contrary to law even though he did not know it was wrong'.
- B** 12. Thus, under s 84 of the Penal Code, criminality has to be determined according to that legal test and not merely by the mental state of an accused person according to the medical test.
13. There is a distinction between the notion of a legal insanity and medical insanity. Not every form of insanity exempts a person from criminal responsibility. Only legal insanity provides that exemption under s 84 of the Penal Code. The specie of insanity addressed by s 84 is the one that impairs the cognitive faculties of a person. Its nature and extent must be that to make the offender incapable of knowing the nature of his act, or that he is doing is wrong or contrary to law. The criminality of an act therefore must be determined by this test laid down in s 84 as distinguished from the medical test (see *Ratanlal and Dhirajla's Law of Crimes*, (25th Ed), p 280). As was stated recently by this court through the judgment of Ariffin Zakaria JCA (as he then was) in *Public Prosecutor v Muhammad Suhaimi Abdul Aziz* [2004] 1 CLJ 378:
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- E** It is settled law that the defence of insanity under s 84 is concerned with the accused's legal responsibility at the time of the alleged offence and not with whether he was medically insane at that time. See *Pendakwa Raya v Zainal Abidin bin Mat Zaid* [1993] 1 CLJ 147; *Public Prosecutor v Misbah bin Saat* [1997] 3 MLJ 495.
- F** 14. When the defence of insanity is raised the court thus needs to consider two matters, namely:
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- (i) whether the accused person had successfully established, as a preliminary issue, that at the time of committing the act he was of unsound mind; and
- (ii) if he was of unsound mind, whether he has proven that his unsoundness of mind was of a degree to satisfy one of the tests earlier mentioned ie, that the accused was incapable of knowing the nature of his act as being wrong or against the law ...
- H** 15. It is also settled law that the burden of proof rests on the person who raises the defence of insanity (see *Juraimi bin Hussein v Public Prosecutor* [1998] 1 MLJ 537; [1998] 2 CLJ 383 also *Baharom v Public Prosecutor* [1960] 1 MLJ 249). ...
- I** [20] We consider the evidence of SP11 that the respondent was of sound mind; the evidence of SP13 that he has not seen any signs of the respondent having any mental illness; the evidence of the respondent himself from the dock who had not said anything about him having any mental illness and/or having received any psychiatric treatment which, in our view, confirms the

report of SP11 that the respondent had informed him that the respondent had never received any psychiatric treatment anywhere.

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[21] We agree with the submission of the learned deputy that from the evidence, the behaviour of the respondent was the behaviour of a normal person. From the testimony of SP6, SP11 and SP13, we find there is nothing to show that the respondent was suffering from any mental illness that had impaired his cognitive faculties and that the respondent was incapable of knowing the nature of his act or of knowing that what he did was wrong or contrary to law.

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[22] We also consider the following evidence of SD3 in cross-examination (pp 430–431, 433–434: RR *Jld* 5):

DPP: ... you have stated ... that the few characteristic for a person to be categorized as person suffering from depressive disorder like to (sic) appetite, sadness, depressive mood, disturb sleep. So my question is you agree that for a person to be categorized as under a case of depressive disorder all this characteristic must be very stuck in nature, very serious in nature.

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SURENDRA: I agree, yes ...

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DPP: ... You will agree that for a person who suffered from depressive disorder all this (sic) syndromes will cause him not able to work properly, to carry out his job functions properly.

SURENDRA: Yes if in that condition of course he will not be in a condition to continue his job or his work any kind of activities which has been carrying out. In that condition he will not be able to do any meaningful productive work, of course.

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DPP: ... In this case you were unable to determine the mental state of the patient at the time of the incident or even after the incident because you did not see the patient afterwards. You agree?

SURENDRA: ... I do not know ... before the incident what was his mental condition I do not know. ...

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[23] There was no re-examination of SD3. As for SP13, during cross-examination, no evidence was elicited that at any time during his employment or immediately prior to the commission of the offence, the respondent had exhibited a behaviour showing the syndromes of a depressive disorder severe degree with psychotic features (see *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212).

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A [24] Having regard to all the above, it is our unanimous decision that there are merits in the appeal by the prosecution. We are satisfied, on the evidence before the court, that the learned trial judge had misdirected himself and had erred in His Lordship's finding that the respondent had successfully raised the defence of insanity under s 84 of the Penal Code.

B [25] We, therefore, allow the appeal. The order of the learned trial judge is set aside and we substitute the finding of the learned trial judge with that of a conviction under s 302 of the Penal Code. We find the respondent guilty of murder and sentenced him to death.

C *Appeal allowed.*

Reported by Afiq Mohamad Noor

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